92-1976

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

JORGE ORTIZ, JR.,

Petitioner,

v.

GERALD DIETER and
JAMES BOWSER,

Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1) Whether or not the Court of Appeals erred as a matter of law in affirming the denial of Petitioner's Motion for Judgment notwithstanding the verdict where: 1) The jury found that §1983 Petitioner proved that Respondents arrested Petitioner; and 2) The undisputed evidence of record demonstrated that Respondents arrested Petitioner based upon an uncorroborated anonymous tip, which tip lacked requisite specificity and any further support which would permit the suspicions engendered by the unknown informant's tip to ripen into a judgment that a crime was probably being committed so as to serve as a basis for an arrest within the bounds of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Jorge Ortiz, Jr., prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit entered March 15, 1992 per Stapleton, Roth and Lewis, Circuit Judges, is unrecorded and appears at page 1 of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania entered July 8, 1992 per Huyett, J., at ____ F.Supp. ____ E.D. Pa. (1992) and page 3 of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit is dated March 15, 1993, and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Courts rests upon 28 U.S.C. §1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

29 U.S.C. §1983

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner filed this action against Respondent seeking damages sustained as a result of Respondents' alleged arrest of Petition without probable cause, and Respondent' use of excessive force.

In June, 1992, this case proceeded to trial before the Honorable Daniel H. Huyett, 3d. The jury returned a verdict in favor of Respondents. However, the jury found as a fact that Respondent did arrest Petitioner. (Appendix, Vol. IV, p. 257a). Respondents admitted that Respondents arrested Petitioner based upon an anonymous tip with no indication of the trustworthiness of the informant. (Appendix, Vol. I, p. 62a).

Respondents had no reason to believe that a crime was being committed. Please see, e.g., Appendix, Vol. II, p. 80a. Nevertheless, the trial court upheld the jury's verdict against Petitioner. Petitioner timely appealed the trial court's denial of Appellant's Motion for Judgment N.O.V. Petitioner's appeal is now before this Honorable Court for disposition.

B. STATEMENT OF FACTS

Although Respondents contended Respondents did not arrest Petitioner (Appendix, Vol. 1, p. 23a), the jury

disagreed. (Appendix, Vol. IV, p. 257a).[1] The Judge also disagreed.

Respondent, Dieter, admitted that Respondent physically detained and completely controlled Petitioner. (Appendix, Vol. I, p. 60a; Vol. II, p. 85a). After detaining, bearhugging and tackling Petitioner, Respondents handcuffed Petitioner. (e.g., Appendix Vol. I, p. 57a-60a). Respondent acknowledged that Respondent placed Petitioner in Respondents' complete control and custody. (Appendix Vol. I, p. 60a-61a, Vol. II p. 85a). Respondents threw Petitioner in the police car and continued to detain Petitioner. (Appendix, Vol. I, p. 63a; Vol. II, p. 86a).

Respondents continued to detain Petitioner. (Appendix, Vol. II, p. 86a-87a). Respondents drove Petitioner into an alley (Appendix Vol. II, p. 107a-108a). Respondent, Dieter, told Petitioner that Respondents would arrest Petitioner for loitering and disorderly conduct. (Appendix, Vol. II, p. 109a).

As Respondents admitted, Respondents arrested Petitioner because he was Hispanic:

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[1]The Judge noted "I could almost as a matter of law rule that he was arrested because he was placed in a police car and handcuffed, and if that isn't an arrest, I don't know what an arrest is." (Appendix, Vol. III, p. 169a-170a).

"Q. Why were you pointing your weapon at Mr. Ortiz?"
A. He fit the description of one of the individuals that Com Center had given us.
Q. Okay, well, what about him fit that description?
A. Hispanic male, dark hair, wearing white."

(Appendix, Vol. II. p. 80a).

Petitioner is Hispanic, has dark hair, as do the overwhelming majority of Hispanics.

The fact that Petitioner was wearing some shade of white pants is irrelevant in light of the remainder of the anonymous tip. That is, one of the very limited things the tip did describe was that one of the gunmen was naked from the waist up and the other with white clothes was carrying a gun too large to conceal. (Appendix, Vol. II, p. 133a). As set forth below, Petitioner absolutely did not fit either description.

Although Respondents claimed that Respondents arrested Petitioner because "Plaintiff matched the description" of the anonymous tip received by telephone,

Respondents admitted the tip failed to include crucial information. Respondents admitted Respondents had no idea of the age of the two males. (Appendix, Vol. I, p. 53a, 75a; Vol. II, p. 132a). Respondents admitted Respondents had no idea of the weight of the two males. (Appendix, Vol. I, p.53a, 75a; Vol. II, p. 132a). Respondents admitted Respondents had no idea of the height of the two males. (Appendix, Vol. I, p. 53a, 75a; Vol. II, p. 132a).

One of the so-called suspects had no shirt. (Appendix, Vol. II, p. 133a), and the other was carrying a large type of gun which was bigger than something that could be concealed in a hand. (Appendix, Vol. II, p. 133a).

Respondents had no reason to believe that Petitioner was committing or had committed any crime. Respondents admitted that they never saw Appellant with a gun. (Appendix, Vol. I, p. 54a). Respondents never found weapons on Petitioner. (Appendix, Vol. I, p. 60a). Respondents admitted that Respondents never saw any type

of bulge consistent with Petitioner trying to conceal a gun.

Respondents did not speak to Petitioner. (Appendix, Vol. I, p. 55a). Respondents admitted that Respondents approached Petitioner with their guns drawn. (e.g. Appendix, Vol. I, p. 44a, 54a). Respondents admitted bearhugging and tackling Petitioner (e.g., Appendix, Vol. I, p. 45a-46a).

The anonymous tip reported two Hispanic males with various large guns in the neighborhood. (Appendix, Vol. II, p. 132a, 133a). One of the armed men was naked from the waist up. (Appendix, Vol. I, p. 49a; Vol. II, p. 132a, 133a). The other reported armed man was supposedly carrying a large gun (i.e. sawed-off shotgun), too large to conceal. (Appendix, Vol. II, p. 132a-133a). That is all the information the anonymous report contained. (Appendix, Vol. II, p. 133a). Petitioner was walking blocks north of the reported armed men. (Appendix, Vol. I, p. 50a). Petitioner was alone. (Appendix, Vol. I, p. 51a, 52a). Petitioner was

not naked from the waist up nor was Petitioner carrying any gun of any size. Although Petitioner is Hispanic, so is the entire neighborhood where Petitioner was walking. (Appendix, Vol. I, p. 50a). Respondents had actual knowledge that the neighborhood was predominately Hispanic. (Appendix, Vol. II, p. 77a). Petitioner was not carrying or concealing a gun or any other weapon and did not appear to be concealing any weapon. (Appendix, Vol. I, p. 52a, 54a; Vol. II, p. 85a).

Both Respondents candidly admit Respondents saw no evidence of a gun on Petitioner's person. (Appendix, Vol. I, p. 58a; Vol. II, p. 80a, 81a, 82a). Several people were out walking in the neighborhood as Respondents arrived. No one signaled to Respondents that they needed a police officer. (Appendix, Vol. II, p. 78a, 79a).

When Respondent, Dieter, first spotted Petitioner, Petitioner was standing, peacefully by a tree. (Appendix, Vol. I, p. 52a). Respondent, Dieter, approached Petitioner

first. Respondent, Dieter, pulled up in Respondents' patrol car with a trained attack dog. (Appendix, Vol. I, p. 58a). Respondents released the dog, which after Respondents tackled Petitioner, was standing on Petitioner. (Appendix, Vol. II, p. 112a). After Respondent, Dieter, had drawn his gun and approached Petitioner, Respondent, Bowser arrived and drew his gun. (Appendix, Vol. I, p. 56a).

Even after Respondents searched Petitioner, (Appendix, Vol. I, p. 59a, 62a; Vol. II, p. 84a, 88a), and determined that Petitioner had no weapons, Respondents detained, arrested, and beat up Petitioner. (Appendix, Vol. I, p. 59a; Vol. II, p. 84a). Respondent tripped and knocked down Petitioner. (Appendix, Vol. I, p. 59a; Vol. II, p. 84a). Respondent, Bowser, admitted telling Petitioner that "[he] was f-cking lucky he didn't get shot." (Appendix, Vol. II, p. 88a).

Upon these facts, the Trial and Appellate Court refused to enter judgment N.O.V. for Petitioner,

Plaintiff/Petitioner now seeks review by this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

1) Whether or not the Court of Appeals erred as a matter of law in affirming the denial of Petitioner's Motion for Judgment notwithstanding the verdict where: 1) The jury found that §1983 Petitioner proved that Respondent's arrested Petitioner; and 2) The undisputed evidence of record demonstrated that Respondents arrested Petitioner based upon an uncorroborated anonymous tip, which tip lacked requisite specificity and any further support which would permit the suspicions engendered by the unknown informant's tip to ripen into a judgment that a crime was probably being committed so as to serve as a basis for an arrest within the bounds of the United States Constitution?

1. The jury found as a fact that Respondents arrested Petitioner. Although Respondents contended Appellees did not arrest Appellant (Appendix, Vol. I, p.

23a), the jury disagreed. (Appendix, Vol. IV, p. 257a)[2] The Judge also disagreed.

Respondent, Dieter, admitted that Respondents physically detained and completely controlled Petitioner. (Appendix, Vol. I, p. 48a; Vol. II, p. 85a). After detaining, bearhugging and tackling Petitioner, Respondents handcuffed Petitioner. (e.g., Appendix, Vol. I, p. 57a-60a). Respondents acknowledged that Respondents placed Petitioner in Respondents' complete control and custody. (Appendix, Vol. I, p. 60a, 61a; Vol. II, p. 85a). Respondents threw Petitioner in the police car and continued to detain Petitioner. (Appendix, Vol. I, p. 63a; Vol. II, p. 86a).

Respondents continued to detain Petitioner. (Appendix, Vol. II, p. 86a, 87a). Respondents drove

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[2]The Judge noted "I could almost as a matter of law rule that he was arrested because he was placed in a police car and handcuffed, and if that isn't an arrest, I don't know what an arrest is." (Appendix, Vol. III, p. 169a-170a).

Petitioner into an alley (Appendix, Vol. II, p. 107a, 108a). Respondent, Dieter, told Petitioner that Respondents would arrest Petitioner for loitering and disorderly conduct. (Appendix, Vol. II, p. 109a). Upon these facts the jury found the Respondents had in fact arrested Petitioner. (Appendix, Vol. IV, p. 257a).

2. The Fourth Amendment to the United States Constitution requires probable cause for an arrest. The United States Constitution, Amendment Four.

3. Respondents arrested Petitioner without probable cause.

a. After this incident between Petitioner and Respondents, Respondents admitted no one ever investigated the anonymous report because Respondents had insufficient information and no witness. (Appendix, Vol. I, p. 62a). The undisputed facts indicate Respondents have no indication of the reliability or trustworthiness of the informant.

b. Respondents arrested Petitioner based upon an anonymous telephone tip (Appendix, Vol. II, p. 80a) without any indication of the reliability of the tip and without any critical information regarding the reported gunmen. As Respondents admitted, Respondents arrested Petitioner because he was Hispanic:

> "Q. Why were you pointing your weapon at Mr. Ortiz?"
> A. He fit the description of one of the individuals that Com Center had given us.
> Q. Okay, well, what about him fit that description?
> A. Hispanic male, dark hair, wearing white."
>
> (Appendix, Vol. II. p. 80a).

Petitioner is Hispanic has dark hair, as do the overwhelming majority of Hispanics.

The fact that Petitioner was wearing some shade of white pants is irrelevant in light of the remainder of the anonymous tip. That is, one of the very limited things the tip did describe was that one of the gunmen was naked from

the waist up and the other with white clothes was carrying a gun too large to conceal. (Appendix, Vol. II, p. 133a). As set forth below, Petitioner absolutely did not fit either description.

c. Although Respondents claimed that Respondents arrested Petitioner because "Plaintiff matched the description" of the anonymous tip received by telephone, Respondents admitted the tip failed to include crucial information. Respondents admitted Respondents had no idea of the age of the two males. (Appendix, Vol. I, p. 53a, 75a; Vol. II, p. 132a). Respondents admitted Respondents had no idea of the weight of the two males. (Appendix, Vol. I, p.53a, 75a; Vol. II, p. 132a). Respondents admitted Respondents had no idea of the height of the two males. (Appendix, Vol. I, p. 53a, 75a; Vol. II, p. 132a).

One of the so-called suspects had no shirt. (Appendix, Vol. II, p. 133a), and the other was carrying a large type of gun which was bigger than something that could

be concealed in a hand. (Appendix, Vol. II, p. 133a).

d. Respondents had no reason to believe that Petitioner was committing or had committed any crime. Respondents admitted that they never saw Petitioner with a gun. (Appendix, Vol. I, p. 54a). Respondents never found weapons on Petitioner. (Appendix, Vol. I, p. 60a). Respondents admitted that Respondents never saw any type of bulge consistent with Petitioner trying to conceal a gun.

Respondents did not speak to Petitioner. (Appendix, Vol. I, p. 55a). Respondents admitted that Petitioner did not run. (Appendix, Vol. I, p. 56a). Respondents admitted that Respondents approached Petitioner with their guns drawn. (e.g. Appendix, Vol. I, p. 44a, 54a). Respondents admitted bearhugging and tackling Petitioner (e.g., Appendix, Vol. I, p. 45a-46a).

The anonymous tip reported two Hispanic males with various large guns in the neighborhood. (Appendix, Vol. II, p. 132a, 133a). One of the armed men was naked from the

waist up. (Appendix, Vol. I, p. 49a; Vol. II, p. 132a, 133a). The other reported armed man was supposedly carrying a large gun (i.e. sawed-off shotgun), too large to conceal. (Appendix, Vol. II, p. 132a-133a). That is all the information the anonymous report contained. (Appendix, Vol. II, p. 133a). Petitioner was walking blocks north of the reported armed men. (Appendix, Vol. I, p. 50a). Petitioner was alone. (Appendix, Vol. I, p. 51a, 52a). Petitioner was not naked from the waist up nor was Petitioner carrying any gun of any size. Although Petitioner is Hispanic, so is the entire neighborhood where Petitioner was walking. (Appendix, Vol. I, p. 50a). Respondents had actual knowledge that the neighborhood was predominately Hispanic. (Appendix, Vol. II, p. 77a). Petitioner was not carrying or concealing a gun or any other weapon and did not appear to be concealing any weapon. (Appendix, Vol. I, p. 52a, 54a; Vol. II, p. 85a).

Both Respondents candidly admit Respondents saw no

evidence of a gun of Petitioner's person. (Appendix, Vol. I, p. 58a; Vol. II, p. 80a, 81a, 82a). Several people were out walking in the neighborhood as Respondents arrived. No one signaled to Respondents that they needed a police officer. (Appendix, Vol. II, p. 78a, 79a).

e. Under the circumstances, Respondents used excessive force against Petitioner. Petitioner herein incorporates Petitioner's above argument as if fully set forth at length. When Respondent, Dieter, first spotted Petitioner, Petitioner was standing, peacefully by a tree. (Appendix, Vol. I, p. 52a). Respondent, Dieter, approached Petitioner first. Respondent, Dieter, pulled up in Respondents' patrol car with a trained attack dog. (Appendix, Vol. I, p. 58a). Respondents released the dog, which after Respondents tackled Petitioner, was standing on Petitioner. (Appendix, Vol. II, p. 112a). After Respondent, Dieter, had drawn his gun and approached Petitioner, Respondent, Bowser, arrived and drew his gun. (Appendix,

Vol. I, p. 56a).

Even after Respondents searched Petitioner, (Appendix, Vol. I, p. 59a, 62a; Vol. II, p. 84a, 88a), and determined that Petitioner had no weapons, Respondents detained, arrested, and beat up Petitioner. (Appendix, Vol. I, p. 59a; Vol. II, p. 84a). Respondent tripped and knocked down Petitioner. (Appendix, Vol. I, p. 59a; Vol. II, p. 84a). Respondent, Bowser, admitted telling petitioner that "[he] was f-cking lucky he didn't get shot." (Appendix, Vol. II, p. 88a).

f. Respondents' arrest of Petitioner based upon an anonymous tip where reliability is unknown to Respondents and where no evidence exists that Petitioner has committed or is committing a crime fails to constitute probable cause as a matter of law.

i. Good faith on part of arresting officer is not enough to arrest without a warrant. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134

(1959). Compare, Commonwealth v. Perez, 407 Pa. Super. 614, 595 A.2d 1315 (1991) where Pennsylvania's Superior Court suppressed evidence as the fruit of an illegal arrest where a Hispanic male was stopped only on the basis of an anonymous tip which disclosed evidence of illegal conduct.

The requirement of probable cause must be strictly enforced as a standard of the Fourth Amendment to the United States Constitution. Henry v. United States, supra. "Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." Henry v. United States, supra at 139-140.

ii. An anonymous tip needs further support to serve as a basis for an arrest. Spinelli v. U.S., supra; United States v. Singleton, 439 F.2d 381 (3d Cir, 1971) (informant's tip must be verified by independent personal observation by police). The record is devoid of any

evidence which "would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." Spinelli v. United States, supra 21 L.Ed.2d at 645.

In Aquila, Spinelli and Draper, the Supreme Court has given "content to the notion of probable cause." Spinelli, supra, 21 L.Ed.2d at 645.

The United States Supreme Court has stated that although Aquila and Spinelli involved a search without a warrant and Draper involved whether the police had probable cause for an arrest without a warrant, "the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue." Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1964). Thus, cases involving searches without warrants are analogous to cases involving arrests without warrants. The lower courts erred as a matter of law in finding otherwise.

iii. *Probable cause exists only* where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 379 (1959), citing Carroll v. United States, 267 U.S. 137, 162, 69 L.Ed. 543, 555 45 S.Ct. 280 (further citations omitted).

Probable cause means more than a bare suspicion, the line between mere suspicion and probable cause "must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances. United States v. Thompson, 420 F.2d 536 (3d Cir, 1970), citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L.Ed. 1879 (1949).

iv. Prudent men in the shoes of Respondents would NOT have seen enough to cause them to

believe that Petitioner was violating the law. Id. Petitioner herein incorporates his facts and arguments above as if fully set froth at length. Due to the paucity of information regarding the alleged gunmen and informant, and the complete failure of evidence to support a conclusion that Petitioner was armed and dangerous, the lower courts erred as a matter of law in denying judgment N.O.V.

The United States Supreme Court has conclusively determined that warrantless searches are per se unreasonable absent exigent circumstances. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The same logic applies to warrantless arrests. "As to persons, the overwhelming weight of authority is that a police officer may make an arrest without a warrant where he has probable cause to believe the suspect has committed a felony." United States v. Miles, 468 F.2d 482 (3d Cir, 1979), citing Coolidge, supra. Applying the United States Supreme Court standard to the case at bar, the Trial and Appellate Courts

erred in denying Petitioner's Motion for Judgment N.O.V.

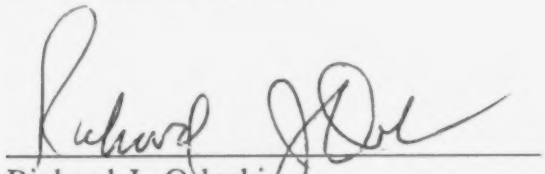
g. The Trial Court erred as a matter of law in denying Petitioner's motion for judgment notwithstanding the verdict. As stated above, the jury found that Respondents arrested Petitioner. Respondents had no indication of the reliability or trustworthiness of the informant's telephone tip. Further, Respondents had no rational, legitimate reason to believe that Petitioner had committed or was committing any crime. Hence, the Trial and Appellate Courts erred as a matter of law in denying Petitioner's Motion for Judgement N.O.V.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1678

JORGE ORTIZ, JR.,

Appellant

v.

GERALD DIETER; JAMES BOWSER

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-03664)
District Judge: Honorable Daniel H. Huyett, 3d

Submitted: March 15, 1993

BEFORE: STAPLETON, ROTH, and LEWIS,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by

appellant, it is

ORDERED AN ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court.

/s/ _____
Circuit Judge

ATTEST:

/s/ _____
P. Douglas Sisk, Clerk

DATED: April 5, 1993

Certified as a true copy and issued in lieu
of a formal mandate on April 27, 1993

Teste: /s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JORGE ORTIZ, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
GERALD DIETER	:	
JAMES BOWSER	:	NO. 91-3664

CIVIL JUDGMENT

Before THE HONORABLE DANIEL H. HUYETT, 3RD

AND NOW, this 2nd day of July, 1992, in accordance with Jury Verdict of July 2, 1992,

IT IS ORDERED that Judgment be and the same is entered in favor of defendants and against plaintiff.

BY THE COURT:

ATTEST /s/ Leslie F. Stott
Deputy Clerk

Leslie F. Stott

ENTERED: July 8, 1992